

**For discussion
on 14 July 2015**

**Legislative Council
Panel on Food Safety and Environmental Hygiene**

**Regulatory Measures and Enforcement Actions against
Illegal Extension of Business Area by Food Premises**

Purpose

In response to the Ombudsman's recommendations in his direct investigation report published in May 2013, the Food and Environmental Hygiene Department ("FEHD") has rolled out enhanced regulatory measures and taken intensified enforcement actions against illegal extension of business area by restaurants and other food premises. This paper briefs Members on the implementation and effectiveness of the enhanced regulatory measures and enforcement actions.

Background

2. When a restaurant licensee/licence applicant wishes to use the open area outside his restaurant for alfresco dining, he is required to obtain permission from the licensing authority. FEHD, as the licensing authority, has been tackling illegal extension of business area by food premises through the licensing system and enforcement under the Public Health and Municipal Services Ordinance (Cap. 132) ("PHMSO"), Food Business Regulation (Cap. 132X)¹, and the Summary Offences Ordinance (Cap.228)². In addition to prosecution, FEHD may impose

¹ Section 34C of the Food Business Regulation prohibits licensees from carrying on food business beyond the confines of the premises. Breaches of this provision render the offenders liable on conviction to a maximum fine of \$10,000 and imprisonment for three months.

² For food premises causing obstruction to the public by placing articles in public place, FEHD officers may take prosecution pursuant to section 4A of the Summary Offences Ordinance. The maximum penalty is a fine of \$5,000 and imprisonment for three months.

administrative sanctions on licensees of the food premises under the Demerit Points System³ (“DPS”) for convicted offences under PHMSO and its subsidiary legislation, and under the Warning Letter System⁴ for breaches of licensing requirements or conditions.

3. At the Panel meeting on 13 May 2014, Members were briefed on the Ombudsman’s recommendations in its direct investigation report published in May 2013 and the enhanced regulatory and enforcement measures adopted or to be adopted by the FEHD with a view to better tackling the problem of illegal extension of business area on the part of restaurants and other food premises. The major recommendations in the report are summarised as follows –

- (i) explore and consider setting up a taskforce and using diverse strategies to deal with unauthorised food operations in public places;
- (ii) based on the situation of each district, set objectives and formulate strategies for tackling illegal extension of business area by restaurants and to exercise more stringent control and conduct targeted raids on recalcitrant offenders, including making arrests and seizure of articles and applying for closure orders against unlicensed restaurants from the Court;
- (iii) seek the views and support from the District Councils (DCs) for gaining public recognition and reducing resistance from the offenders and suggest DCs designating suitable areas for

³ Under the Demerit Points System, a pre-determined number of demerit points ranging from five to 15 (depending on the nature and severity of the offence) will be registered against a licensee upon conviction of an offence in relation to food safety and environmental hygiene under the Public Health and Municipal Services Ordinance and its subsidiary legislation. A licence will be suspended for seven days if 15 points are accumulated within a period of 12 months (first suspension) and 14 days if another 15 points are accumulated within 12 months from the date of the last offence that led to the first suspension (second suspension). If another 15 points are accumulated within 12 months from the date of the last offence that led to the second suspension, the licence will be cancelled.

⁴ Under the Warning Letter System, breaches of licensing requirements or conditions will result in issuing verbal/written warnings to the licensee. Accumulation of three written warnings within a period of six months and detection of subsequent breaches will lead to cancellation of a licence.

alfresco dining; and to facilitate applications from restaurant operators for setting up outside seating accommodation at those spots;

- (iv) consider amending the relevant legislation to simplify the mechanism for appeal against suspension or cancellation of licences from three-tier to two-tier and to refrain from withholding the suspension or cancellation of licences pending appeals by restaurant licensees except under very special circumstances;
- (v) lengthen the “observation period” before the issuance of provisional licence and consider extending the applicability of the non-standard licensing requirements of prohibiting encroachment on Government land to all premises under application for restaurant licences; and
- (vi) refuse to process, for a specific period of time, application made by an applicant (including his/her representative) whose restaurant licence has previously been cancelled due to repeated offences, for any restaurant or related licence in relation to the same premises.

Effectiveness of the Enhanced Regulatory and Enforcement Measures

4. Taking into consideration the Ombudsman’s recommendations in the direct investigation report, FEHD has rolled out the following enhanced regulatory and enforcement measures to curb the proliferation of illegal extension of business area on the part of food premises –

(a) *Enhanced enforcement and prosecution process*

5. Since May 2013, FEHD’s enforcement in districts where illegal extension of business area by licensed food premises was most rampant has been strengthened through arrests and seizures. Apart from conducting more frequent inspections and stepping up prosecution against illegal extension of business area by licensed food premises, FEHD also continues to expedite the prosecution process and provide supplementary

information that helps the court consider imposing a heavier sentence against illegal extension of business area. The enforcement and complaint statistics for 2012 to 2015 (up to 30 April) are at **Annexes I** and **II** respectively.

(b) Food Business Extension Control Task Force

6. Since May 2013, FEHD put together a special task force, later retitled as the Food Business Extension Control Task Force (“FBECTF”), on a pilot basis to pursue enhanced enforcement actions in selected districts to strengthen the capacity of the districts to deal with the problem. The FBECTF monitors closely the food premises in locations with a history of illegal extension of business area throughout the peak business hours during weekdays and holidays, and takes stringent enforcement actions, including arrest and prosecution of offenders and seizure of the articles used. Having contained the problem in Tsuen Wan district, FBECTF extended its coverage to include Kwai Chung and Shatin districts since October 2013 and July 2014 respectively.

7. In June 2014, FEHD set up two additional teams of FBECTF to combat the problem in Yuen Long district. Following vigilant enforcement actions for almost a year, the extent of illegal extension of business area by licensed food premises in Yuen Long district has reduced considerably. Hence, one of the FBECTF teams was redeployed to Tuen Mun district in April 2015.

8. Since May 2013 (and up to 30 April 2015), FBECTF have taken out 205 prosecutions, 32 arrests and 71 seizures of articles against offending food premises at blackspots in the five selected districts. Details of the enforcement figures broken down by district are at **Annex III**.

9. The hard work of FBECTF is paying off. This is borne out by the sharp decrease in complaint figures in these districts for the past two years (**Annex IV**). We will closely monitor the situation of various districts and consider redeployment of the FBECTF teams to tackle illegal extension blackspots in other districts.

(c) ***Suspension and cancellation of licences***

10. FEHD continues to expedite the execution of licence suspension and cancellation. For recalcitrant offenders, the department upholds its decisions of licence suspension or cancellation even though appeals against such decisions are pending determination by the Licensing Appeals Board (“LIAB”) or the Municipal Services Appeals Board (“MSAB”).

11. In 2013, there were 242 and 70 licence suspension and cancellation cases respectively. Among them, 40 and 27 cases lodged appeals to LIAB against licence suspension and cancellation respectively. In 2014, there were 209 and 23 licence suspension and cancellation cases respectively. Among them, 8 and 12 cases lodged appeals to LIAB against licence suspension and cancellation respectively. There has been a significant reduction in the number of appeal cases in 2014 when compared to that in 2013. The reduction may be partly due to the department’s decision not to suspend the operation of the decision of licence suspension or cancellation. The above approach has to a certain extent helped curb attempts on the part of licensees to abuse the appeal mechanism.

12. For food premises the licences of which have been subject to suspension and cancellation, FEHD would upload a list of such food premises on its website for public information and continue to update the list from time to time.

(d) ***Additional licensing requirements***

13. Apart from measures to enhance the effectiveness of enforcement and strengthen deterrence, in processing applications for provisional licence for food premises with records of repeated prosecutions, FEHD will continue to impose an additional licensing requirement demanding the applicants not to occupy areas beyond the confines of their premises. No provisional licence will be granted if such requirement is not met. Besides, FEHD will immediately cancel a provisional licence without warning and will not process further the connected full licence application if the premises are found to have breached the aforesaid licensing requirement.

14. Since the implementation of the new licensing control in May 2013, 16 provisional licences were cancelled due to non-compliance with the aforesaid additional licensing requirement after the issue of the provisional licence.

(e) Refusal of application

15. In respect of a food premises the food business licence of which has previously been cancelled due to repeated illegal extension of business area, FEHD will not process the application for the same type of licence made by the former licensee or his representative/business partner/business proprietor within 12 months from the date of cancellation of the licence. A new applicant is required to make a statutory declaration that he/she has no business connection with the former licensee or his/her representative/business partner/business proprietor before a licence would be issued. If the applicant makes a false statement in a statutory declaration or submits forged document, not only is he/she liable to prosecution, FEHD will also refuse the issue of licence and cancel immediately any such licence issued.

(f) Applying for closure order

16. For food premises which continue to operate after cancellation of licence due to repeated offences and convictions, FEHD will take stringent prosecution actions and consider applying for a court order to close the premises. When considering whether to apply for a closure order, the department will accord higher priority to unlicensed food premises with repeated offences on illegal outside seating area, whether or not the premises are under application for a licence. In the course of applying for a closure order, FEHD will stop processing the licence application until the court has handed down its decision. After a closure order is granted by the court, on top of closing the premises in question and publicising details of the unlicensed food premises thus closed, FEHD will not process further all licence applications in respect of the closed premises for as long as such a closure order remains in force.

17. Since December 2013, six closure orders (one in Mong Kok, two in Yuen Long, two in Shatin and one in Kwai Chung) were granted

by the court and successfully executed. Upon applications by the owners of the premises to the courts, and having been satisfied that the premises would not be used for unlicensed food premises, the court rescinded the six closure orders after a closure period ranging from about two to seven and a half months.

Consultation with District Councils

18. For districts where the problem of illegal extension of business area by food premises exists, FEHD has consulted the District Councils on proposals to designate spots for alfresco dining. Most of them have indicated that there are no suitable spots for alfresco dining in their districts.

19. With a view to balancing the interests of stakeholders when consulting the public on applications for setting up outside seating accommodation (OSA) for restaurants, the OSA Working Group⁵ set up under the Economic Analysis and Business Facilitation Unit (EABFU) of the Financial Secretary's Office has reviewed the procedures involved in handling OSA applications.

20. Upon the recommendation of the Working Group, FEHD has enhanced the mechanism for considering objections to OSA applications from the public by seeking the relevant departments' comments in regard to complaint and enforcement statistics related to the restaurant under OSA application. In addition, to facilitate the applicant in setting up OSA at a suitable location, where the OSA application met with objections raised by concerned departments other than local objection, a joint departmental meeting with the applicant will be convened at which the relevant departments will discuss their concerns/objections with the applicant direct.

21. FEHD has been co-ordinating and approving applications for OSA for restaurants meeting the relevant requirements relating to land use, building safety, fire safety, planning and transport. Between

⁵ The Working Group comprises representatives from the Food and Environmental Hygiene Department, Fire Services Department, Buildings Department, Lands Department, Planning Department, Housing Department, Transport Department, Home Affairs Department and Economic Analysis and Business Facilitation Unit.

January 2002 and April 2015, FEHD had approved 344 applications for OSA.

Simplification of Appeal Mechanism

22. It was mentioned in the Ombudsman's direct investigation report that licensees can defer the effective date of licence suspension or cancellation by exploiting the lengthy appeal process and the discretion of FEHD to suspend the implementation of the decision pending results of the appeals. The Ombudsman also noted that there was no successful appeal case against suspension and cancellation of food business licences relating to illegal extension of business area under the DPS in 2012 out of a total of 70 and 27 appeal cases to LIAB and MSAB respectively. The Ombudsman considered that the current three-tier appeal mechanism too cumbersome and that a two-tier appeal mechanism should suffice; and thus recommended FEHD to consider amending the relevant legislation to simplify the current appeal mechanism⁶.

23. To follow up on the Ombudsman's recommendation, consultations with stakeholders, including the Food Business and Related Services Task Force ("FRSTF")⁷ and the Business Liaison Groups (Restaurants and Non-restaurants) ("BLGs")⁸, were conducted. Members of the BLGs raised concerns about the deprivation of the opportunity and right of appeal of the licensees. The FRSTF also strongly objected to the proposal on the grounds that the proposed

⁶ A licensee dissatisfied with FEHD's decision to suspend or cancel his/her licence may (a) make a representation to FEHD, as an administrative procedure, in seven days, or in four days for a serious breach; (b) appeal to LIAB against FEHD's decision within 14 days under section 125(9) of PHMSO; and (c) in case LIAB upholds or varies FEHD's decision, appeal to the MSAB within 14 days under section 125B(4) of PHMSO. Under section 125(10) of PHMSO, if an appeal is made, DFEH may in its discretion, suspend the operation of the decision of licence suspension or cancellation, pending the determination of the appeal.

⁷ FRSTF is set up under the Business Facilitation Advisory Committee (BFAC) to conduct sector-specific or licence-specific regulatory reviews and facilitate business consultation on regulatory proposals. BFAC advises and reports to the Financial Secretary the development and implementation of programmes and measures to facilitate business compliance with government regulations and to sustain a competitive regulatory environment for business in Hong Kong while safeguarding public interest.

⁸ BLGs are set up under Task Force on Business Liaison Groups which reports to the BFAC and are formal discussion forums established to further strengthen communication between the trade and the Government.

simplification might infringe on licensees' legitimate right to appeal and undermine the checks and balances within the current appeal system. It opined that the Government should consider simplifying the appeal procedures instead of removing one tier of statutory appeal in a bid to reduce the time for processing appeal cases.

24. Having carefully considered the stakeholders' views and assessed the effectiveness of the enhanced regulatory and enforcement measures as mentioned in paragraphs 5 to 17 above, the Government considers that there is no imminent need to pursue the simplification of the appeal mechanism at this moment. Nevertheless, FEHD will vigilantly monitor the situation. If abuse of the appeal mechanism for the purpose of deferring or evading the sanctions of licence suspension or cancellation (which undermines the effectiveness of the sanction system against recalcitrant offenders) is observed, the Government will re-visit the need for simplification of the appeal mechanism.

Way Forward

25. FEHD will continue to strengthen regulatory and enforcement measures against illegal extension of food business by restaurants and other food premises in the light of changing circumstances, and review their effectiveness from time to time.

Conclusion

26. Members are invited to note and comment on the content of this paper.

Food and Health Bureau
Food and Environmental Hygiene Department
July 2015

Annex I

Prosecutions against illegal extension of business area by restaurants

Year Offence	2012	2013	2014	2015 <i>(Up to 30 April)</i>
Food Business Regulation, Cap. 132X (Section 34C)	1 123	859	442	123
Food Business Regulation, Cap. 132X (Section 31(1)(b))	1 018	1 535	814	118
Summary Offences Ordinance, Cap. 228 (Section 4A)	1 115	1 163	741	254

Annex II

**Complaint figures against illegal extension of
business area by restaurants**

Year	2012	2013	2014	2015 <i>(Up to 30 April)</i>
Number of complaints	4 955	4 648	3 832	1 184

**Enforcement statistics against illegal extension of business area by Food
Business Extension Control Task Force (FBECTF)
in the five selected districts**

(up to 30 April 2015)

District	Date since which FBECTF was deployed to the district	No. of Prosecution	No. of Arrest	No. of Seizure
Tsuen Wan	June 2013	144(14)	8	29
Kwai Chung	October 2013	25(19)	10	12
Shatin	July 2014	6(6)	4	4
Yuen Long	July 2014	30(13)	10	26
Tuen Mun	April 2015	0	0	0
Total :		205(52)	32	71

Remarks

Figure in bracket denotes the number of prosecution taken out in connection with arrest action.

Annex IV

Complaints figures against illegal extension of business area by restaurants in the five selected districts with deployment of the Food Business Extension Control Task Force (FBECTF)

Year \ District	Number of complaints received by district					
	Tsuen Wan¹	Kwai Tsing²	Shatin³	Yuen Long⁴	Tuen Mun⁵	Total
2013	345	126	355	1 096	265	2 187
2014	142	99	187	651	338	1 417
2015 (Up to 30 April)	30	13	93	183	62	381

Remarks : ¹ The FBECTF was deployed to Tsuen Wan since June 2013.

² The FBECTF was deployed to Kwai Chung since October 2013.

³ The FBECTF was deployed to Shatin since July 2014.

⁴ The FBECTF was deployed to Yuen Long since July 2014.

⁵ The FBECTF was deployed to Tuen Mun since April 2015.